No. 490.

In the

United States Circuit Court of Appeals

for the Ninth Circuit.

Howard Insurance Company of New York,

Plaintiff in Error,

vs.

S. Silverberg and William C. Pease,

Defendants in Error.

Brief on Behalf of Defendants in Error.

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Of Counsel.

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....., Clerk.

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This action was commenced in the Circuit Court for the Northern District of California, on December 22, 1897, by the plaintiff in error, a New York corporation, against defendants in error, citizens of California.

Defendants demurred to the complaint, and the demurrer was sustained and the action dismissed by the Circuit Court, on the ground that the cause of action was barred by Subdivision 1 of Sec. 339 of the Code of Civil Procedure of California, which provides that an action on a contract, obligation or liability founded on an instrument of writing executed out of the State must be commenced within two years after the cause of action has accrued.

The case comes to this Court on writ of error to the

Circuit Court. The errors assigned are, that the Circuit Court erred in deciding that plaintiff's cause of action was barred by the Statute of Limitations, and in ordering the cause to be dismissed without giving plaintiff an opportunity to amend its complaint.

THE FACTS.

The following facts appear from the complaint:

On February 1, 1892, plaintiff recovered a judgment in the Superior Court of the City of New York against Julius Jacobs and George Easton for $7,485.83.

Before August 10, 1892, Jacobs and Easton appealed from this judgment to the General Term of the Superior Court of the City of New York.

Jacobs and Easton desired to stay execution of this judgment pending the appeal to the General Term, but were unable to procure sureties residing in the State of New York, and they thereupon requested plaintiff to accept as sureties the defendants, Silverberg and Pease, who then resided in California. Plaintiff agreed to accept the defendants as such sureties, and on August 10, 1892, "at the request of Jacobs and Easton, and for the purpose of perfecting such appeal and obtaining a stay of execution," Silverberg and Pease signed their undertaking, in which they recited the recovery of this judgment by plaintiff and the appeal by Jacobs and Easton to the General Term, and undertook, "pursuant to the statute in such cases made and provided," that appellants would pay all costs and damages that might

be awarded against them on the appeal, not exceeding five hundred dollars, and further undertook, that if the judgment appealed from, or any part thereof, should be affirmed, or the appeal dismissed, the appellants would pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which judgment should be affirmed.

Defendants made the necessary affidavits and acknowledgments to this undertaking on August 10, 1892, before James L. King, a Commissioner for New York, in San Francisco, California.

On September 10, 1892, plaintiff stipulated in writing that it would not except to Silverberg and Pease as sureties, and that the undertaking might be filed in the Superior Court of the City of New York, and that no exception should be taken to the form of the undertaking, and that it should operate as a stay; and on the last-named day the undertaking was filed by Jacobs and Easton in the office of the Clerk of said Superior Court, and a copy thereof was served upon plaintiff.

On January 15, 1894, the General Term of the Superior Court affirmed the judgment, and awarded the Howard Insurance Company $117.59 for costs and damages on the appeal. On the same day, plaintiff served upon the attorneys for Jacobs and Easton notice of the affirmance of the judgment and award of costs. On April 17, 1897, plaintiff served a similar notice on defendants.

On December 13, 1894, Jacobs and Easton appealed from the judgment of affirmance to the Court of Appeals

of the State of New York, and in 1896, the Court of Appeals affirmed the judgment so appealed from. The judgment has not been paid, and plaintiff seeks by this action to recover from the defendants, as sureties on the appeal bond, the amount of the judgment and award.

ARGUMENT.

The plea of the Statute of Limitations is based upon the proposition that it appears from the complaint that the bond was executed out of the State of California.

I.

This court takes judicial notice of the laws of New York; therefore, it is not bound on demurrer by the averment of them in the complaint.

Before proceeding with our argument, we deem it proper to refer to this familiar rule, because the complaint abounds in statements of the provisions of the New York Code of Civil Procedure. Such pleading, in a United States court, is bad. Where it correctly states the law, it is surplusage. Where its statements are inaccurate, they are not conclusive even on demurrer.

In Lamar vs. Micou, 114 U. S., 218–223, the Supreme Court said: "The law of any state of the Union, "whether depending upon statutes or upon judicial "opinions, is a matter of which the courts of the "United States are bound to take judicial notice, with-"out plea or proof." See also

Owings vs. Hull, 9 Peters, 607, 625;
Elwood vs. Flannigan, 104 U. S., 562, 568;
Covington Drawbridge Co. vs. Shepherd, 20 How., 227;
Gormley vs. Bunyan, 138 U. S., 623;
Martin vs. B. & O. R. R. Co., 151 U. S. 673;
Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U.S., 455.

Therefore, we assume that the Court will consider the New York law, rather than counsel's averment of it. Where the New York code sections are not fairly stated in the complaint, we shall not hesitate to refer to the code, and shall refer to some sections which the complaint does not mention.

II.

The allegation, that defendants made, executed and delivered the bond "within said State of California," is not admitted by the demurrer nor conclusive against defendants. The undertaking was executed wholly out of the State of California, and first became a binding obligation when filed in New York.

a) Without doubt, facts well pleaded are admitted to be true for the purposes of the demurrer, but an allegation of a conclusion of the pleader, inconsistent with his statement of the facts on which it is based, must be disregarded.

Gruwell vs. Seybolt, 82 Cal., 7;
Ency. of Pleading and Pr., Vol. 12, p. 1026. Title "Legal Conclusions";

Byrum vs. Stockton Combined, etc., Works, 91 Cal., 657; (In connection with Art. 12, Sec. 16, Constitution of California.)

Stoddard vs. Treadwell, 26 Cal., 294;

Love vs. Sierra Nevada, etc., Co., 32 Cal., 639;

Dillon vs. Barnard, 21 Wall., 430, 437;

Interstate Land Co. vs. Maxwell Land Co., 139 U.S., 569, 577;

Chicot Co. vs. Sherwood, 148 U. S., 529, 536;

Pullman Car Co. vs. Mo. Pac. Co., 115 U. S., 587, 596;

Gould vs. Evansville & C. R. R. Co., 91 U. S., 526, 536.

b) Conceding the doctrine of the cases on pages 3 and 4 of plaintiff's brief, that where parties to a contract agree that it shall be deemed to have been made in any specified place, such agreement will determine by what law it is to be construed — and that is as far as those cases go,— in order to apply the rule, there must first be such an agreement. Is there even a suggestion of it in the complaint? Does counsel seriously ask the Court to imagine such an arrangement, *dehors* the written contract, for the purpose of reconciling his conclusion with the averment of repugnant facts?

But, counsel argues, it must be assumed that there was an agreement that the contract should be deemed executed in California, because it is apparent that the parties intended to make a California contract. Passing over, without comment, the difficulty of interpreting, let alone enforcing, an intention not expressed, we dispute the premise. If there is one thing clear in the

complaint, it is, that the parties intended to make a New York contract. The bond was executed to perfect an appeal in an action pending in a New York court and to furnish security to a New York corporation. It bore the caption, "Superior Court of the City of New York." In its body it not only referred to a proceeding in a New York court, but in the words, "pursuant to the statute in such cases made and provided," it expressly stated that it was made with reference to a New York law. It was acknowledged before a Commissioner of New York. It was not intended to be used in any place other than New York, and, as a matter of fact, it was filed in New York.

Jacobs and Easton did not, as stated by counsel, request permission to give a California contract, nor did the plaintiff agree to accept such a contract. They did request the plaintiff to take a bond to be signed by two known residents of California. That, the plaintiff agreed to, and that was the only modification of its statutory rights to which the plaintiff did agree, prior to the stipulation of September 10, 1892. (Transcript, pages 5, 8 and 9.) Even if there had been such an agreement, as counsel claims, between Jacobs and Easton and the Howard Insurance Company, how could that, or any other arrangement between those parties, bind Silverberg and Pease?

Counsel speaks of plaintiff's "relinquishing the advantages of a New York contract." We have shown that it did not. If he means that it relinquished something by taking Silverberg and Pease as sureties, we

suggest that the complaint shows that Jacobs and Easton could not get residents of New York as sureties: *non constat*, but that the plaintiff believed that the judgment against Jacobs and Easton was uncollectible, and it was willing to permit an appeal and stay, for the purpose of making its judgment a charge against the two bondsmen, who were financially responsible. (Transcript, pages 7 and 8.) There is nothing to show that Silverberg and Pease had no property in New York, to which the plaintiff might look to satisfy its claim.

In conclusion, we say there is no basis in the pleading for the assumption that the plaintiff, a New York corporation, intended to accept or did accept a California contract.

Counsel for the plaintiff in error argues that there is no delivery, in the ordinary sense, of a bond on appeal, because it is executed without the assent, and possibly against the will of the respondent. This argument, carried to its logical conclusion, will demonstrate that a bond is not a contract—a conclusion hardly acceptable to the plaintiff.

c) To prevent the application of Subd. 1, of Sec. 339, of the California Code of Civil Procedure to this case, counsel imports into that section the word "wholly." Though that is unwarranted, it would hardly further his contention. While we do not claim that the word "delivery" is synonomous with "execution", we do insist that the delivery of an instrument is the significant factor in determining when or where it is executed. This is not a mere technicality, but the word "execution", etymologically, and as commonly used,

signifies to carry into complete effect, or to complete. See, for instance, the Century Dictionary, which gives as a definition for the word "execution": "To follow out or through to the end; perform completely, as something projected, prescribed or ordered; carry into complete effect; accomplish," etc.

Webster's International Dictionary gives as a definition for the word "execute": "1. To follow out or through to the end; to carry out or into complete effect; to complete," etc.

"2. To complete, as a legal instrument; to perform what is required to give validity to, as by signing", etc.

The essential idea in every definition is completion. Until a contract is delivered, it is not completed, and therefore the time or place of delivery is the time or place of the completion of the contract, and the time or place of its execution.

Section 1626 of the Civil Code of California provides that—"A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

Can there be more than one place or time at which a contract is completed or takes effect? If not, there is but one place of execution of a contract.

The contention of counsel, that the bond in question was executed partly in California and partly in New York, has, at least, the merit of originality. No one ever before thought of suggesting such a proposition and therefore counsel has produced no authority to give color to it.

d) Sec. 1933 of the California Code of Civil Procedure provides, that: "The execution of the instrument is the subscribing and delivering it, with or without the affixing of a seal."

Had Silverberg and Pease only signed this paper, and kept it, or had they given it to Jacobs and Easton, and had those gentlemen returned it, destroyed it, or merely kept it without using it, no rights on the part of the Howard Insurance Company, or liability on the part of the bondsmen could have arisen.

Stetson v. Briggs, 114 Cal., 511;
Ivey v. Kern County Land Co., 115 Cal., 196.

In the case last cited, the Supreme Court of California says, distinguishing it from cases where an offer is made by mail and a letter of acceptance is posted (such as counsel has cited):

> "In the case before us the proposed contract, after it was signed by the defendant, was not sent by mail to the plaintiff, but was sent to defendant's agent in charge of their branch office or agency at Bakersfield, and was, by its agency, delivered to the plaintiff at that place; so that, until its actual delivery to the plaintiff, it was in the power and under the control of the defendant, and the acceptance and execution of the proposed contract was not complete until such delivery, and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made. (Ford v. Buckeye State Ins. Co., supra.; Milliken v. Pratt, 125 Mass. 375; Ames v. McCamber, 124

Mass. 85; Northampton Live Stock Ins. Co., 40 N. J. L. 476; Shuenfeldt v. Junkerman, 20 Fed. Rep. 357; Whiston v. Stodder, 8 Mart. (La.) 95; 13 Am. Dec. 281; Scudder v. Union Nat. Bank, 91 U. S. 406."

There is no indication that Silverberg and Pease had any connection whatsoever with the Howard Insurance Company before the latter received a copy of their bond and the bond was filed. The undertaking was made for the purpose of benefiting Jacobs and Easton. The defendants herein were under no obligation to the Howard Insurance Company, or to any one else for that matter, to execute the bond. It was given to Jacobs and Easton, to use if they saw fit. They were not bound to use it. Silverberg and Pease could not have complained had Jacobs and Easton obtained different sureties and filed a different bond. Until the latter had actually filed the bond, and thereby obtained the benefit of an appeal and stay of proceedings, there was no privity between the parties to this action, and as the Howard Insurance Company had suffered no detriment, the bond might have been withdrawn at any time, and the defendants would have been under no liability to the Company.

Suppose that during the month that intervened between August 10th, when the bond was signed, and September 10th, when it was filed, Jacobs and Easton had found two residents of New York who were willing to become their bondsmen, and had filed a bond with New York sureties, instead of using that of Silverberg

and Pease, could the Howard Insurance Company have made any claim against the defendants in error?

In Covert v. Shirk, 58 Ind., 264, which was a suit against the sureties on a bond on appeal from a Justice's judgment, one of the bondsmen set up as a defense that after signing the undertaking and giving it to one of the appellants, for whose accommodation it was made, but before it was delivered to the Justice, he directed the Justice not to receive it with his name on it, and informed the Justice that he withdrew from it and that he had so notified the appellant; nevertheless, the Justice received, filed and approved the bond.

After quoting the Indiana statutes requiring the appellant to file with the Justice a bond to be approved by him, the Supreme Court of that State says:

> "From this it will be seen that no duty is devolved on the appellee in regard to the taking or approving an appeal bond in the Justice's Court. It is a matter about which he need not be consulted, and about which he cannot intermeddle, except with the consent of the Justice. The duty as well as the responsibility of taking and approving such a bond belongs to the Justice alone. In the performance of that duty, we think he stands in the place of the appellee, and is responsible to him on his official bond for its faithful performance.
>
> "It seems to us, therefore, that notice to the Justice of any matter affecting the validity of an appeal bond, which he is called upon to approve, is as effectual as if given to the obligee in a case

where it devolves upon him to accept or approve the bond.

"The execution of the bond in suit was not complete until it was delivered to the Justice. The answer shows that before it came into the hands of, or had been filed with the Justice, he had received a notice from Covert, amounting, as we construe it, to a revocation of the authority for its delivery. Under these circumstances, we feel constrained to hold that the subsequent acceptance and approval of the bond by the Justice were unauthorized and wrongful and not binding on Covert, and as a consequence, that the bond as to Covert was not properly delivered to the Justice."

It was held that there was no liability on the part of the sureties.

Approved of in Allen v. Marney, 65 Ind., 398.

From the foregoing, we think it clear, both on reason and authority, that until the undertaking in question was filed, which, as we shall presently show, constituted its delivery, there was no liability on the part of the bondsmen.

Of course, a contract implies a meeting of minds, and the delivery of an ordinary contract is significant as determining the time when the parties have by their action unmistakably manifested their mental condition. The law cannot determine mental conditions except by their expression, and, as a matter of convenience, it has fixed upon a visible act; that is, delivery, as the expression of final assent which shall bind the obligor on a contract. The reason why delivery is regarded rather

than signing, is, that until delivery, there is no likelihood of the obligee's being able to determine whether or not final assent has been given.

In the case of a statutory undertaking, executed, as counsel well suggests, possibly without the consent or even the knowledge of the obligee, it is especially necessary to fix upon some act which, beyond question, will determine that the obligor has satisfied the conditions imposed, not by the obligee, but by the law. For that reason the statutes of the various States provide what shall be done to make a binding undertaking.

The laws of New York, to comply with which the undertaking in question was (as appears on its face) executed, have the following provisions on the subject:

*) "Sec. 810. A bond or undertaking, given in an action or special proceeding, as prescribed in this act, must be acknowledged or proved, and certified, in like manner as a deed to be recorded."

"Sec. 812. A bond or undertaking executed by a surety or sureties, as prescribed in this act, must, where two or more persons execute it, be joint and several in form; and, except as otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or freeholder within the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all debts and liabilities, which he owes or has incurred, and exclusive of property, exempt by law from levy and sale under an execution. A bond or under-

*) These quotations are from Throop's Annotated Code of Civil Proceedure, published in 1892. We have quoted this edition because it states the law as it was at the time when this contract was made.

taking given by a party, without a surety, must be accompanied by his affidavit, to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court, before which the proceeding is taken, or a judge thereof, or the judge, before whom the proceeding is taken. The approval must be endorsed upon the bond or undertaking."

(We have omitted the last two portions of Sec. 812 because they have no bearing on this case.)

"Sec. 816. A bond or undertaking required to be given by this act must be filed with the clerk of the court; except where, in a special case, a different disposition is directed by the court, or prescribed in this act."

"Sec. 1307. An undertaking, given as prescribed in this chapter, must be filed with the clerk with whom the judgment or order appealed from is entered."

The law has thus determined what act shall be taken to manifest the final assent of the obligor on an undertaking on appeal.

"Where a contract is delivered, or first becomes a binding obligation upon the parties is deemed the place of the contract for the purpose of distinguishing what law governs."

Am. & Eng. Ency. of Law, Vol. 3, p. 547.

It has been held in many cases that the delivery of an undertaking on appeal is the act of filing it with the clerk of the court. For example, see

Selden v. Del. & Hudson Canal Co., 29 N. Y., 634.

In Cushman v. Martine, 13 How. Pr., 402, the court said, referring to an undertaking required by the New York Code:

"The Code declares that to render an appeal effective for any purpose, a written undertaking must be executed on the part of the appellant, &c. (Sec. 334.) It also requires a copy of this undertaking to be served on the adverse party, with the notice of appeal (Sec. 340), and the original to be filed with the clerk with whom the order or judgment appealed from was entered (Sec. 343).

"Secs. 334 and 340, taken together, import that an appeal is ineffectual for any purpose unless the notice of appeal and a copy of the undertaking are served at the same time on the adverse party.

"Sec. 334 enacts that an appeal shall be of no force or effect whatever until the prescribed undertaking has been executed, &c.

"The execution of an undertaking imports and includes a *delivery* of it.

"Secs. 334 and 340 prescribe what shall consti-

The references in Cushman v. Martine were to the former New York Code of Civil Procedure.

Section 334, there referred to, corresponds in a general way with Sec. 1326 of the present Code, which is as follows:

"1326. To render a notice of appeal to the court of appeals effectual, for any purpose, except in a case where it is specially prescribed by law, that security is not necessary to perfect the appeal, the appellant must give a written undertaking to the effect that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof is served, as prescribed in this title."

Section 340, there referred to, conforms with Sec. 1334 of the present Code, which, in 1892, was as follows:

"1334. Where two or more undertakings are required to be given, as prescribed in this title, they may be contained in the same instrument, or in different instruments, at the option of the appellant. Each undertaking must be executed by at least two sureties, and must specify the residence of each surety therein. A copy thereof,

tute a delivery of it. It is delivered by filing the original and serving a copy of it."

See also Holmes v. Ohm, 23 Cal., 268;
Harris v. Regester & Sons, 70 Md., 109, 120;
Burgess v. Lloyd, 7 Md., 200;
Chateugay Ore & Iron Co. v. Blake, 35 Fed. Rep., 804;
Byers v. Gilmore, 50 Pac. Rep., 370.
Wells v. Child, 12 Allen, 330.

f) The undertaking of the defendants had not only to be filed, but according to Sec. 810 of the New York Code, it was requisite that it should be acknowledged. Even this act, in contemplation of law, was performed in New York, for James L. King, while acting as Commissioner for New York, was an instrumentality of the government of that State, and, though physically in San Francisco, was legally in New York. The principle is the same as that which exempts a federal building or a military reservation from interference through the exercise of the sovereignty of the State, in which, geographically, it is situated. See the California Political Code, Sec. 813.

Silverberg and Pease cannot be held to have been bound by the undertaking at any time before it became effective to secure an appeal for Jacobs and Easton.

Sec. 812 of the New York Code requires such a bond to be accompanied by the affidavit of each surety, stating that he is a resident of, and householder or freeholder within, the State of New York. The bond filed by Jacobs and Easton showed affirmatively that the sureties were not residents of New York. Until a

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with a notice showing where it is filed, must be served on the attorney for the adverse party, with the notice of appeal or before the expiration of the time of appeal."

Section 343, or the part referred to in the opinion, corresponds generally with Sec. 1307 of the present Code.

proper bond was filed, and notice of filing served, the appeal was not effectual for any purpose. (New York Code, Secs. 1326 and 1352.)

In Raymond v. Richmond, 76 N. Y., 106, it was held that where the bond filed was not in accordance with the provisions of the statute, there was no appeal. See also Benedict, etc., Mfg. Co. v. Thayer, 82 N. Y., 610.

In Manning v. Gould, 90 N. Y., 476, it appeared that the respondent in the original case had excepted to the sufficiency of the sureties on appeal, and the sureties refused to justify. The judgment was affirmed. On a suit on the appeal bond, it was held that the sureties were not liable, because, when they failed to justify, the appeal was in the same condition as if no bond had been given.

See also Powers v. Chabot, 93 Cal., 266;
Freeman v. Hill, 25 Pac. Rep., 870;
Albertson v. Mahaffey, 6 Or., 412;
State v. McKinnon, 8 Or., p. 485.

> Sec. 1305 of the New York Code provides that "an undertaking, which the appellant is required by this chapter to give, or any act which he is required to do for the security of the respondent, may be waived by the written consent of the respondent."

From the foregoing it would appear that until the Howard Insurance Company stipulated in writing waiving the requirements of the New York statute regarding the residence of the sureties, there was no consideration for the bond, for it was insufficient to perfect the appeal. This was done only after the bond

had reached New York on September 10, 1892. (Transcript pages 8 and 9.)

During the preceding month there was no appeal. The judgment was not stayed, and the plaintiff in error was at liberty to take out execution. It follows, of course, that the defendants could not be bound before the undertaking was effective to stay the hand of the plaintiff.

g) It may be stated as a general proposition that whenever a writing is signed at one time or place, but delivered at another, the time or place of delivery is the time or place of contract.

Am. & Eng. Ency. of Law, Vol. 3, p. 547.

Milliken v. Pratt, 125 Mass. 374, was an action against a married woman who had guaranteed an account of her husband. The paper was written and signed in Massachusetts, and there delivered by the defendant to her husband, who sent it by mail from Massachusetts to the plaintiff in Portland, Me. Under the laws of Massachusetts a married woman could not execute such a contract, while under the laws of Maine she could. The suit, therefore, resolved itself into a question of whether the contract was made in Massachusetts or in Maine. The court said:

> "If a contract is completed in another State, it makes no difference in principle whether a citizen of this State goes in person or sends an agent, or writes a letter across the boundary line between the two States. As was said by Lord Lyndhurst: 'If I, residing in England, send down my agent to Scotland, and he makes contracts for me there,

it is the same as if I myself went there and made them.' Pattison v. Mills, 1 Dow & Cl., 342,363. So, if a person residing in this State signs and transmits, either by a messenger or through the postoffice, to a person in another State, a written contract which requires no special forms of solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to, and acted upon by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote or signed it there; and it is no objection to the maintenance of an action thereon here that such a contract is prohibited by the law of this commonwealth."

In Duncan v. United States, 7 Peters, 435, an official bond of the postmaster to the United States, signed and acknowledged in New Orleans, but sent to Washington to the Post Office Department, was held to be a contract made at Washington, because there delivered.

In Cook v. Litchfield, 9 New York, 279, the question was whether an endorsement of notes was made in Michigan or in New York. The Court said:

"The defendant endorsed the notes for the accommodation of the maker. This appears from the fact that the notes came from the possession of the maker, and not the endorser, and were first negotiated in New York, and apparently for the benefit of Carew, the maker. So long as they remained in Carew's hands there was no liability on the part of the endorser. The en

dorser's contract, therefore, must be regarded as having been made in New York, where the notes were delivered to Ryckman, and the endorsement first became effective."

In Tilden v. Blair, 21 Wallace, 241, a resident of Chicago drew a draft on residents of New York, payable to his own order, and dated at Chicago. Tilden & Co. accepted the draft at New York, but returned it to the drawer to use in Illinois. It was held that the endorsement was a contract made in Illinois. "It has been settled that the liability of an acceptor does not arise from merely writing his name on a bill, but that it commences with the subsequent delivery," etc.

In Lawrence v. Bassett, 5 Allen, 140, the Court said:

"The defendant put his name on the back of the note in another State, while it was in the hands of the original maker and before it was delivered to the payee. It was subsequently passed to the latter in this State for a valuable consideration, and then for the first time became a valid promise to pay the money. Until such delivery, it was not a binding and operative contract upon which the defendant could have been held as a party to the note. It was, therefore, the delivery to the plaintiff which completed and consummated the contract."

Bell v. Packard, 69 Me., 105, quoting from syllabus:

"A promissory note written in this State, but signed in Massachusetts by citizens there, and then returned by mail to the payee in Maine, is a note made in Maine, and to be construed by the laws thereof."

From the opinion, page 110:

> "For although it was signed in Cambridge, it was delivered to the payee in Showhegan, and it was not a completed contract until delivered. This proposition needs no citation of authorities, still we cite Lawrence v. Bassett, 5 Allen, 140, as precisely in point."

On the same point see also:

Wayne Co. Savings Bank v. Low, 9 Abb. N. C., 390;
Lee v. Selleck, 33 N. Y., 615;
Burce v. State of Maryland, 11 G. & J., 383;
McPherson v. Meek, 30 Mo., 345;
Wildcat Branch Bank v. Ball, 45 Ind., 213;
Roads v. Webb, 91 Me., 406.

See the very recent case of People v. Cummings, reported in "California Decisions, Vol. 17, page 42."

In Shuenfeldt v. Junkerman, 33 Fed. Rep., 357, it wa held that negotiable paper, signed and expressly payable in New York, and mailed to Pennsylvania, was a Pennsylvania contract.

The question has often arisen in States in which Sunday laws are in operation, as to whether a note or obligation, signed on Sunday but delivered on another day, is a Sunday contract. It has always been held that the date of delivery is the date of the contract.

In Commonwealth v. Kendig, 2 Penn. St., 448, it was held that a bond, signed on Sunday and delivered on Monday, was good, notwithstanding the Sunday law, because it had no validity until delivered.

Speaking about a similar contract, the Supreme Court of Michigan, in Hall v. Parker, 26 Am. Rep., on page 543, said:

"It could not take effect from the signing, but only from the delivery or filing."

In State v. Young, 23 Minn., 551, the court said:

"It is almost an elementary principle, laid down in all books, that a bond is not 'executed' until it is delivered, for delivery is of the essence of a deed. It takes effect only from execution on delivery, and until delivery it is not a contract, and is of no further value than the paper upon which it is written.

"This bond not having been delivered until the following Thursday, the mere signing of it on Sunday did not affect its validity. In the proper and legal sense of the term it was not 'executed' on Sunday but on Thursday."

Clough v. Davis, 9 N. H. 500.

Hill v. Dunham, 7 Gray, 543.

In Flanagan v. Meyer & Co., 41 Ala., 132, it appeared that Flanagan, as principal, and Key, as surety, signed a note on Sunday; that Flanagan took possession of it and rode away. The payees sued on the note, and the defendant Key requested the court to charge the jury, that if they found from the evidence that she was only a surety, and that all she did in relation to the execution of the note was done on Sunday, that they could not find against her. The court refused so to instruct, and the Supreme Court held its refusal proper. It said:

"Writing and signing a note on Sunday is not the execution of it on that day, unless it be delivered the same day to the payee. * * * When Mrs. Key signed the

note sued on in this case as the surety of Flanagan, and gave to Flanagan the possession of it, it could have been for no other purpose than to be delivered to the payees, and if it was delivered on any other day than Sunday, it was binding upon her as a valid contract. But it is insisted that the act of Mrs. Key in delivering the note to Flanagan, to be delivered to Meyer & Co., was itself a contract within the prohibition of Sec. 1577 of the code. We hold that Mrs. Key made no contract on Sunday with Flanagan. It takes two or more to make a contract, and it must be founded on a valuable consideration; for the benefit and accommodation of Flanagan, and without valuable consideration moving to her therefor, she signed the note as his surety, having no interest in its being delivered to the payees, and being under no obligation, legally or morally, to deliver it or have it thus delivered. If Flanagan should become bound by it, then it was to become binding on her, but otherwise not. Neither did Mrs. Key make any contract with the payees of the note until it was delivered to them, and they could have no right of action there against her or Flanagan for its non-delivery. It seems to us too clear for argument that what Mrs. Key did in the premises on Sunday did not amount to the making of a contract, and therefore is not within the prohibition of the statute."

See also Chamberlain v. Hopps, 8 Vt., 94.

In the case of U. S. v. Le Baron, 19 How. 72, 76, 77, it was held that a postmaster's bond to the United States

speaks only from the time it reaches the Postmaster-General, and is accepted by him, and until that time it is only an offer or proposal of an obligation, which may become complete and effectual by acceptance. A bond, like a deed, speaks from the date of its delivery.

In the case of Evansville v. Morris, 87 Ind. 269, an official bond was signed on Sunday, and handed to the principal by the sureties, and by him presented to the mayor for approval on Monday; it was held not executed on Sunday. The court said:

> "This bond was not delivered upon the Sabbath day, and as it was not executed until it was delivered, it follows that it was not executed upon the Sabbath day."

As to when an official bond takes effect, see

> People v. Van Ness 79 Cal., 84.
> Wells v. Child, 12 Allen, 330.

As against this long line of authorities, the plaintiff has cited the single case of Alcalda v. Morales, 3 Nev., 132.

In that case the court said (page 136):

> "In contemplation of law, an instrument cannot be said to be made or executed until completed. After the complete execution of an instrument, it is still not binding until delivered * * * It certainly has not the binding effect of a bond or deed until delivered. But it seems to us that the delivery of this bond must be held to have been made in Nevada. It was written in California, and signed by one of the obligors there. The money was loaned or advanced before the bond was finally executed."

Then follows the extract quoted by counsel.

While we must criticise this case for the loose use of the term "execute," which the judge seems to confuse with signing, it is easily distinguishable from the case at bar. There, the obligee had paid the consideration for a bond already drawn up and signed by one of the obligors, and all that remained to be done by the second obligor was to sign and seal it, and transmit it to the obligee. These features are manifestly absent from the case at bar.

(g) Counsel is inclined to make much of the preliminary agreement between the plaintiff and Jacobs and Easton. That could in no way bind Silverberg & Pease, and did not bind the Howard Insurance Company.

Under Sec. 1305 of the New York code, such a waiver was not effective unless it was in writing. That the preliminary agreement was not in writing, is indicated by counsel's failure to plead that it was, coupled with the subsequent stipulation in writing, made after the bond had come to New York (and, as we must assume, after it had been examined by the plaintiff.) Undoubtedly, both Jacobs & Easton and the Howard Insurance Company considered this stipulation in writing necessary for the purpose of the waiver. (Transcript, pages 8 and 9.) The language of the pleading in this regard is significant. As to the preliminary agreement, it is:

> "And said *Jacobs and Easton* thereupon requested this plaintiff to accept as sureties on such undertaking the defendants hereinbefore named, who then resided in the said State of California, and this plaintiff thereupon agreed *to accept* the defendants as such

sureties, notwithstanding they resided in the State of California, and *to waive* the right to sureties residing within the State of New York." (Transcript, page 5.)

It is clear that the plaintiff did not then presently accept or waive the New York sureties. The entire arrangement contemplated a future act.

As to the second agreement, the pleading states:

"That after the execution of the said undertaking, to-wit, on or about the tenth day of September, 1892, this plaintiff *stipulated in writing* that it would not except to the sureties thereon, and that such undertaking might be filed in said Superior Court of said city of New York, that no exception should be taken by this plaintiff to the form of the undertaking or the time of its filing or the justification of the sureties, and that such undertaking should operate as a stay of proceedings; that thereafter on the same day, the said undertaking on appeal was filed by the said Jacobs and Easton in the office of the clerk of said Superior Court last named, and a copy thereof served upon this plaintiff, and the *appeal of said Jacobs and Easton from the said judgment was then perfected and a stay of the execution thereof effected," etc.* (Transcript, pages 8 and 9.)*

*(The italics are ours.)

But, aside from the question of whether the preliminary agreement was binding on the plaintiff or the defendants, and viewing that agreement in the light most favorable to the plaintiff, what was its scope?

The plaintiff did not agree with *Silverberg and Pease* to accept them as sureties. Before the appeal of Jacobs and Easton could become effective, an undertaking had to be drawn—

1. Containing the conditions prescribed by the New York code,
2. Signed, and
3. Acknowledged
4. By two residents and householders or freeholders of New York, and
5. Filed, and
6. A copy served with notice of its filing.

Here were six requirements that had to be fulfilled. In its preliminary agreement with Jacobs and Easton—if that was effectual for any purpose, which we deny—the plaintiff waived just one requirement—that the sureties should be residents and property holders of New York. It did not agree that as soon as Silverberg and Pease *signed* any kind of a document purporting to be an appeal bond in that case, that that should have the effect of securing an appeal and stay of execution for Jacobs and Easton, even though it was not acknowledged, filed or served, and though not containing the conditions prescribed by the statute. The most that can possibly be claimed for that preliminary agreement was that if Silverberg and Pease executed, (not merely signed) an undertaking fulfilling every other requirement of the New York law, the plaintiff bound itself not to raise an objection that they were not residents or property owners of New York. It was not, however, required to forbear from any proceeding un-

til the bond was in every other respect properly *executed*. This, as we have shown, included the acknowledgment, filing and serving, all of which occurred in New York.

Will it be claimed that, if at any time between August 10th and September 10th, 1892, Jacobs and Easton had informed the attorney for the Howard Insurance Company that they had in their possession a bond on appeal, signed by Silverberg and Pease, that would have prevented the Company from taking out execution on its judgment?

We insist, of course, that it is a fallacious view to treat the plaintiff's offer to *Jacobs and Easton* as an offer to Silverberg and Pease, but, if for the sake of argument we were so to consider it, we must still contend that the offer was only accepted and its conditions completely fulfilled, when a bond embodying the requirements prescribed by the New York law, excepting only the requirement as to the residence of the sureties, properly signed and acknowledged, was filed in the office of the clerk of the Superior Court in New York, and a copy, together with notice of its filing, was served upon the plaintiff.

(h) Counsel goes so far as to intimate that the bond in question would have been effectual without filing, and on this point he cites only the case of Haywood v. Townsend, 4 N. Y. App. Div. 346.

The facts of that case, in brief, were that one Cynthia Lane bequeathed by will $500 to Cynthia J. Haywood, and $300 to Alice Haywood, to be paid to them by Robert H. Townsend, her executor, when they should attain their majority, but until that time, to be kept at interest for

their benefit. By the will, the executor was directed to execute a bond for the benefit of the children before entering upon the discharge of his trust aforesaid. Cynthia Lane died in June, 1864, and letters testamentary were issued to Townsend in December of the same year. On March 15, 1865, the executor, as principal, and John J., and Enoch L. Townsend, as sureties, signed a bond, as required by the will. The next day the executor delivered a copy of the bond to the plaintiff, who was the father of the children, to which was attached an affidavit, to the effect that it was a copy of the original bond, *filed in the office of the Surrogate*. Upon delivering this copy and the affidavit to the plaintiff, the latter paid the executor $800 for the purposes of the trust. Subsequently, one of the children died, and the plaintiff was appointed administrator of her estate, and in that capacity brought suit against the sureties. The original bond remained with Townsend, the executor, or, if filed in the Surrogate's office, was subsequently removed therefrom. The court held that the sureties signed the bond to enable the trustee to get the money, and for that purpose he delivered a sworn copy to the custodian of the fund as a voucher for his authority to receive it, and thereby obtained the money; that the requirement that the bond should be filed with the Surrogate, was for the benefit of the legatees and not for the principal upon the bond or his sureties, and the fact that the principal did not do his duty by filing the bond could not be asserted by the sureties as a defense to a suit thereon, and the court added (page 250):

> "Having, by signing the bond and giving it to the principal, placed it in the power of the principal to secure the money, and he having done so, it has, so far as the principal and the sureties are concerned, served its purpose, and the defendants should not be permitted to repudiate the bond to the detriment of the parties it was apparently given to secure."

The case was one of estoppel. The bond should have been filed for the benefit of the legatees. The sureties had put it in the power of the principal to obtain the money by delivering a sworn copy of the bond, and the principal had made use of it to the same effect and with the same results as if he had filed it; therefore, the sureties were not permitted to take advantage of the omission of the principal.

An undertaking on appeal, in the nature of things, cannot become effectual until it is filed, for, until then there is no appeal, and execution may issue. It is made for the benefit of the appellant to enable him to appeal and obtain a stay of execution, but this he cannot do until a bond has been filed, and until that time the respondent suffers no detriment.

While we do not consider the case of Haywood v. Townsend *as* opposed to our contention, we must still suggest that it is of doubtful authority.

As opposed to it we cite the case of Fay v. Richardson, 7 Pick. 90, which was an action on a bond to the judge of probate for the County of Middlesex, conditioned for the faithful discharge of his duties, by the guardian of a minor. The judge of probate made a decree appointing W. Richardson guardian, "he giv-

ing bond as the law directs." Letters of guardianship were made out but not delivered to him, on which the register endorsed, "to be delivered when bond is filed." Richardson assumed to act as guardian, and received from the surety of the former guardian for his ward, $339.00, and gave a discharge for the same under his hand and seal as guardian. At the time of Richardson's death, the bond had not been filed, but was found among his papers, having the seal of W. Richardson as principal, and the defendant Francis Richardson and another as sureties. The bond had been signed by the principal and sureties in the presence of witnesses and was taken away by the principal. The administrator of the estate of W. Richardson, who died thereafter, filed the bond in the proper office with an endorsement thereon to the effect that he waived no rights. It was also proved that W. Richardson had assigned property to the defendant, Francis Richardson, to indemnify him against his liability on the bond.

The court, through Parker, Chief Justice, said: "We have not been able to find any principle or authority to justify us in giving validity to the bond on which this suit is brought.

"A bond is a deed, and delivery is essential to a deed. There are cases of a constructive delivery, but there is no evidence here to bring this case to a resemblance of them. All that appears is, that the paper was signed and sealed by the principal and sureties and was left in the hands of the principal until his death. The act of his administrator cannot make a delivery, especially as the memorandum was intended to prevent his act being so considered.

For aught we know, it was never intended by the sureties that it should be delivered until sufficient indemnity was given to them by the principal. And it may be, that finding no bond in the probate office, they have on that account omitted to seek for security which they might otherwise have obtained. The certificate on the bond, of approbation by the judge, has no effect, it being manifest that it was made before the bond was signed; for the letter of guardianship remained on the files, with the minute that it was to be delivered when the bond should be filed.

"It is certainly a very hard case for the ward, and shows the importance of great care in the probate office; but it would be equally hard on the sureties to hold them liable. At any rate, they insist upon the law, and we cannot withhold it. The instrument never became their bond by their definitive act of delivery, and it cannot be made so by any power of this court."

III.

SUBDIVISION 1, OF SECTION 339, OF THE CALIFORNIA CODE OF CIVIL PROCEDURE IS NOT UNCONSTITUTIONAL. IT DOES NOT DISCRIMINATE AGAINST NON-RESIDENTS. AS THIS CASE INVOLVES THE CONSTITUTIONALITY OF THAT STATUTE, THIS COURT HAS NOT JURISDICTION OVER THE APPEAL.

It is not directed against non-residents. It applies to contracts executed out of the State, whether by residents or non-residents. If two residents of California make a contract out of the State, any claim of either thereunder

is barred within two years after the cause of action accrues just the same as if a resident of California makes a contract with a resident of another State outside of California. The statute applies to all persons alike.

But even if it has the effect claimed by counsel for plaintiff in error, it is Constitutional and will be enforced in the Federal Courts.

The case of Chemung Canal Bank vs. Lowery, 93 U. S. 72, is directly in point.

That suit was commenced in the United States Circuit Court for the Western District of Wisconsin. *It was brought by a New York corporation upon a New York judgment,* against a citizen and resident of Wisconsin. The defendant pleaded the Wisconsin Statute of Limitations and his plea was sustained by the Circuit Court and the judgment affirmed by the United States Supreme Court.

It was contended that the statute was unconstitutional in this, "that it unjustly discriminates in favor of the citizens of Wisconsin against the citizens of other States; for, if the plaintiff had been a citizen of Wisconsin, instead of a citizen of New York, the statute would not have applied."

The United States Supreme Court, speaking of this Statute, said that it may be expressed shortly thus: "When the defendant is out of the State, the statute of limitations shall not run against the plaintiff, *if the latter resides in the State, but shall, if he resides out of the State.*"

The Court, after discussing the matter, held "that the law in question does not produce any unconstitutional discrimination."

Either the California Statute is available in both the State and National Courts, or it is available in neither.

If counsel's contention is correct—that this statute might be applied in the State courts but not in the Federal courts—it would be an unjust discrimination against residents of California. For if A and B, two Californians, met in New York, and A borrrowed from B $5,000, and gave B his note, payable one day after date, B could bring suit against A only within two years and a day, while if A, on the same day borrowed the same amount of money from C, a resident of New York, upon the same kind of a note, C, being able to sue A in the Federal courts, could commence his action at any time within four years and a day. If the question were a new one, we hardly think this Court, by its decision, would establish such an anomaly.

In the case of Bauserman vs. Blunt, 147 U. S. 647, the United States Supreme Court, after quoting Section 721 of the United States Revised Statutes, said (p. 652): "No laws of the several States have been more steadfastly or more often recognized by this Court, from the beginning, as rules of decision in the Courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest Court." The Court then cited some eighteen cases, from the Fourth Cranch to the 138th U. S. Reports.

In Campbell vs. Haverhill, 155 U. S. 610, the Supreme Court of the United States went so far as to hold that the statutes of limitation of the several States apply to actions at law for the infringement of Letters Patent, which

actions are cognizable exclusively in the Federal Courts.

In that case the Court again said (p. 614), "The argument in favor of the applicability of State statutes is based upon Revised Statutes, Section 721, providing that 'the laws of the several States, excepting, etc. * * * shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.' That this Section embraces the Statute of Limitations of the several States has been decided by this Court in a large number of cases which are collated in its opinion in Bauserman vs. Blunt, 147 U. S. 647. To the same effect are the still later cases of Metcalf vs. Watertown, 153 U. S. 671, and Balkam vs. Woodstock Iron Co., 154 U. S. 177. Indeed, to no class of State legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction."

The point made by counsel, that the statute is an attempt to discriminate against residents of other states, and is therefore void, was one of those objections presented by him to the Circuit Court, which that Court contented itself with saying "there is nothing in."

But this point cannot be considered by this Court at all. It is an attempt, veiled, it is true, but yet discernible, to raise a constitutional question, of which this Court has no jurisdiction. The Appellate Courts' Act of March 3rd, 1891, provides in section 5, "that appeals or writs of error may be taken from the . . . . Circuit Courts direct to the Supreme Court in the following cases. . . . . Sixth. In a case in which the constitution or law of a State is

claimed to be in contravention of the constitution of the United States."

By section six of the same act, it is provided: "That the Circuit Court of Appeals, established by this act, shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the . . . . Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

In Hastings vs. Ames, 68 Fed. Rep. 726, an appeal was taken from a Circuit Court to the Circuit Court of Appeals for the Eighth Circuit. It was claimed that certain laws of Nebraska were repugnant to the 14th Amendment. The Appellate Court held that the case is one in which it is claimed that a law of a State contravenes the Constitution of the United States, and that it accordingly falls within the purview of the provisions of the act of March 3, 1891, which we have quoted, and that the Court of Appeals has no jurisdiction of the appeal. The Court said: "The language of the act of March 3, 1891, which we have quoted above, is very comprehensive; sufficiently so, as we think, to withdraw from the jurisdiction of this Court every case in which it is claimed in good faith that a State statute is in contravention of the Federal Constitution, even though it may be claimed in the same case, that the State statute in question in invalid and inoperative on other grounds. . . . . It surely was not intended that the appellate jurisdiction of the Supreme Court should be limited to that class of cases where a constitutional question is the sole issue involved."

To the same effect is the case of Pauley etc. Co. vs.

Crawford Co., 84 Fed. Rep. 942. There the same Court said: "We have repeatedly held that if it is claimed that a law of a State is void because it contravenes the Constitution of the United States, this Court has no jurisdiction of the case, although it may also involve the consideration of many other questions."

To the same effect are Wrightman vs. Boone Co., 88 Fed. Rep. p. 435; Hamilton vs. Brown, 53 Fed. Rep. 753; Mayor etc. of City of Macon vs. Georgia Packing Co., 60 Fed. Rep. 781.

Therefore, we insist that as this case involves the constitutionality of a statute of California, this Court has no jurisdiction, and is bound to dismiss the appeal.

IV.

THE CAUSE OF ACTION HEREIN ACCRUED JANUARY 15, 1894, AND NEITHER THE PENDENCY OF THE APPEAL TO THE COURT OF APPEALS, NOR ANY OTHER CIRCUMSTANCE STOPPED THE RUNNING OF THE STATUTE OF LIMITATIONS.

Counsel for plaintiff in error, at the close of his brief, "ventures to suggest" that no suit could have been brought on the undertaking pending the appeal in the Court of Appeals. If such were the law, it would be based, necessarily, on one of two propositions, either (a) no cause of action accrued on the bond at the time of the affirmance of the judgment by the General Term, or at any time prior to its affirmance in the Court of Appeals; or (b) the cause of action which arose on the fifteenth day of January, 1894, when the General Term affirmed the judg-

ment, was suspended after an appeal had been taken on the thirteenth of December, 1894, until the affirmance by the Court of Appeals in the year 1896. We will consider these propositions in their order.

(a) The bond, by its terms, referred to an appeal to the General Term of the Superior Court of the City of New York, and unless something is read into it, the liability of the bondsmen accrued upon the failure of Jacobs and Easton to pay the costs and damages of the appeal, and the amount of the judgment, on its affirmance by the General Term of the Superior Court.

The cases cited on page 36 of plaintiff's brief are based on section 1049 of the California Code of Civil Procedure, which provides that: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." That section, being a part of the California Code of Civil Procedure, was intended only to determine the status of a judgment of a California trial court after its rendition, and before affirmance. It certainly could not apply to a judgment of a New York court, for there is no similar provision in the laws of New York. In that State it has always been held that a judgment is *res judicata* until reversed on appeal. In determining the rights or liabilities of litigants arising out of a judgment of the New York courts, both the courts of other States and the federal courts must give that judgment such an effect as it has by the laws of New York, in order to comply with the requirement of the constitution

of the United States (article IV, sec. 1) that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

In order to give full faith and credit to a New York judgment, its effect must be determined by the laws of New York, and not by the law governing judgments of the State, in the courts of which, suit is brought upon it.

We do not think that it is necessary to go that far, however, in support of our contention that the cause of action accrued in January, 1894, because, in the case of Taylor v. Shew, 39 Cal. 536, in which, in the absence of proof to the contrary, the New York law regarding the effect of a judgment was assumed to be the same as that of California, it was held that an action on a judgment of a New York court might be maintained in California, notwithstanding the pendency of an appeal to the Court of Appeals. Of course, it goes without saying, if an action might be maintained on the judgment it could be maintained on a bond which is made to secure the payment of the judgment, and is merely a collateral matter, in which the judgment may be required as evidence. Even if the judgment could not be used as evidence, that would be no reason why a suit could not be brought on the bond, and proceedings therein be stayed until the judgment was in such a condition that it might be used as evidence.

Concordia Sav. & Aid Society v. Read, 14 N. Y. St. Rep. 8.

See also cases cited under subd. b.

(b) The alternative proposition, upon which plaintiff

must rely, is that, assuming that the cause of action accrued on January 15, 1894, upon the affirmance of the judgment by the General Term of the Superior Court, the taking of the appeal in December, 1894, stopped the running of the statute. This is equally untenable.

It may be stated as a general proposition "that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event, which is not within the saving of the statute."

> Wood on Limitations of Actions, sec. 6. See, also, the discussion in the opinion of the California Supreme Court in Davis v. Hart, California Decisions, Vol. 17, No. 948, issue of February 6, 1899.

The only circumstances which are within the saving clauses of the California Statute of Limitations are those mentioned in sections 351 to 356, inclusive, of the Code of Civil Procedure. The pendency of an appeal is not one of them.

This question has been passed on many times by the New York courts.

In Burrall v. Vanderbilt, 6 Abb. Pr. 70, it was held that it was no defense to an action on an undertaking to stay proceedings on appeal to the general term of the Superior Court, that the defendant had since appealed to the Court of Appeals, and perfected his appeal by giving a stay bond. The Court said that a suit on a bond was not a "proceeding in the Court below upon the judgment," or upon the matter contained therein.

In Heebner v. Townsend, 8 Abb. Pr. 234, the Court said:

"As to the third defense set up in the answer, that the judgment debtor hath appealed from the judgment to the Court of Appeals, and hath perfected his appeal, it does not appear when he so appealed, nor does it appear from the answer whether such appeal was perfected before or after this action was brought. If after, it is very clear that such an appeal could not affect the plaintiff's right of action at the time he commenced this action; and, even if the appeal was perfected before the commencement of the action, I do not see how the defendants can set it up as a defense to the action. The fact of the appeal to the Court of Appeals might, on the application of the defendants, authorize a stay of proceedings in this action, or upon any judgment therein against them, until the determination of such appeal; but I do not see how they can plead such appeal in bar of the plaintiff's right of action on their undertaking, even if the appeal was perfected before the action was commenced.

"The undertaking was, that if the judgment was affirmed, then that the appellant would pay not the amount directed to be paid by the Appellate Court, but by the judgment appealed from, and their answer alleges not that the appellant did pay, but that he appealed.

"The perfecting of the appeal to the Court of Appeals stayed all further proceedings in the court below on the judgment appealed from, or upon the matter embraced therein; but this action on the under-

taking is not a proceeding upon the judgment, or upon any matter embraced therein, but is a proceeding upon an independent collateral instrument or matter."

To the same effect is Rice v. Whitlock, 16 Abb. Pr. 225.

In Parkhurst v. Bedell, 110 N. Y. 386, a judgment was admitted in evidence pending appeal. The appellant claimed that it was error. The Court of Appeals held that it was not, even though the appeal was then pending, and the judgment appealed from was subsequently reversed. The Court said:

"But the appeal did not suspend the operation of the judgment as an estoppel. The records of our Court, however, disclose that that judgment was affirmed at the General Term, and upon appeal to this Court was reversed in October, 1884, on the ground that, as a matter of law upon the undisputed facts, the trust deed above mentioned was delivered and did take effect. . . . . If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party, against whom a judgment, which has been subsequently reversed, has thus been received in evidence, can have, is to move, on that evidence, in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discre-

tion, grant or refuse a new trial, as justice may require."

In Harris v. Hammond, 18 How. Pr. 123, the Court said:

> "The fact that an appeal has been brought does not affect the conclusive nature of the judgment as a bar while it remains unreversed."

In Sage v. Harpending, 49 Barb. 174, it was held:

> "The fact that an appeal has been taken to another Court did not affect the conclusive nature of the judgment as a bar while it remained unreversed."

See, also, Ludington's Petition, 5 Abb. N. C. 307, where the Court said:

> "The pendency of the appeal from the judgment does not affect its conclusive character."

See, also, the Matter of the Estate of the Pioneer Paper Co., 36 How. Pr. 11.

In the case at bar, the complaint shows affirmatively (page 11 of Transcript) that there was no undertaking to stay execution pending the appeal to the Court of Appeals.

Section 1309 of the New York Code of Civil Procedure provides:

> "Where an appeal to the Court of Appeals, from that judgment or order, is perfected, *and security is given thereupon, to stay the execution of the judgment or order appealed from,* an action shall not be maintained upon the undertaking, given upon the preceding appeal,

until after the final determination of the appeal to the Court of Appeals."

The provision preventing an action on a bond, if a new stay bond is given on a subsequent appeal, undoubtedly contemplates such an action in case there is no second stay bond.

(c) There is one point, which, though not mentioned in the brief, we assume, from a misstatement of the New York law in the complaint, that the plaintiff intended to rely upon to save the running of the statute. The complaint states in general terms that section 1309 of the New York Code provides that an action should not be maintained on an undertaking on appeal until ten days after service of notice of affirmance upon the attorney for the appellant *and upon the sureties on the undertaking.* (Transcript, page 10.) And the plaintiff further pleads that on January 15, 1894, it served such a notice upon the attorneys, and *on April 17, 1897, upon the sureties.*

The words, "and upon the sureties on the undertaking," were added to section 1309 of the New York Code only on September 1, 1894. When the bond was executed in 1892, and when the cause of action accrued on January 15, 1894, there was no requirement that notice should be served on the sureties before suit.

> See Throop's Annotated Code of Civil Procedure, published in 1892, section 1309, and Stover's New York Annotated Code, published in 1896.

Of course, no such provision entered into the contract, and the sureties could not insist on notice before suit.

At any rate, counsel could hardly seriously contend that if the plaintiff's right of action depended upon a demand or notice, he could avert the bar of the statute of limitations by delaying the giving of such notice or demand.

Estate of John Galvin, 51 Cal. 215;
Dorland v. Dorland, 66 Cal. 189;
O'Neil v. Magner, 81 Cal. 631;
Jones v. Nicholl, 82 Cal. 32;
New York Code of Civil Procedure, sec. 410.*

V.

THE ACTION WAS PROPERLY DISMISSED.

The assignment that the Court erred in dismissing the action without giving plaintiff an opportunity to amend its complaint is not discussed in plaintiff's brief, and has been abandoned.

Sec. 2, Rule 24, of this Court.
City of Lincoln vs. Sun Vapor &c. Co., 59 Fed. R. 756.
Hoge vs. Magnes, 85 Fed. R. 355-58.
Gavin vs. Gavin, 92 Cal. 292.
People vs. Woon Tuck Wo, 120 Cal. 294-97.
Kahn vs. Wilson, 120 Cal. 643.

It is evident that counsel for plaintiff has reached the conclusion that the point is untenable.

The granting or refusal of leave to amend is discretion-

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* "410. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make the demand is complete, except in one of the following cases:

"1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends.

"2. Where there was a deposit of money, not to be repaid at a

ary with the Court below, and not reviewable by this Court.

Gormley vs. Bunyan, 138 U. S. 630.

We will but add that it nowhere appears that plaintiff ever asked leave to amend. Questions not presented to the Court below cannot be considered here.

Kiesel vs. Sun Ins. Office, 88 Fed. R. 243-47.
Paxson vs. Brown, 61 Fed. R. 874-77.

We would be remiss in our duty if we concluded this brief without specially referring to the able opinion of the learned judge of the Circuit Court, which is contained in this record. (Tr., pp. 20-28.)

Many authorities are reviewed in that opinion which we have deemed it unnecessary to refer to elsewhere for that reason.

Howard Ins. Co. of N. Y. vs. Silverberg, 89 Fed. R. 168.

We respectfully submit that the judgment of the lower court was correct and should be affirmed.

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fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand."